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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM A. D. 1950

No. 463

FRED CHAFFIN, *Petitioner*,

vs.

CHESAPEAKE & OHIO RAILWAY COMPANY,
a Corporation, *Respondent*.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

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Petitioner, Appellee Below,

vs.

CHESAPEAKE & OHIO RAILWAY COMPANY,
a Corporation,
Respondent, Appellant Below.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

To the Honorable Fred M. Vinson, Chief Justice, and the Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully shows that he is aggrieved by a final order of the United States Court of Appeals, Fourth Circuit, entered November 8, 1950, wherein said court remanded this cause, No. 6142 therein, to the United States Court for the Southern District of West Virginia, with direction to set aside a judgment entered May 22, 1950, in favor

of this petitioner for $10,000.00 and costs, and instead enter judgment for the defendant, said action being due, this petitioner believes, to a misunderstanding of the facts in evidence and West Virginia law. A question of negligence liability raised in the court below by appellant was not decided. Judge Parker was absent when the case was presented and District Judge Timmerman sat with the other two regular members of the court.

STATEMENT OF THE CASE

The sole question is the right of the Court of Appeals to set aside a verdict and judgment of the trial court, upon a release incorporated in a voucher, which the jury upon specific interrogatories found had been obtained by agents of the Respondent misleading and attempting to defraud petitioner, and which he cashed without knowledge, express or implied that he was thereby settling his claim against Respondent for injuries sustained in the accident. Petitioner was a track worker for a mining company, having only a second reader education in a country school. R. A. 36. He was walking along a straight stretch of railroad track, P. A. 1, commonly used by the general public with knowledge of the railroad company, about 6:35 P. M., November 12, 1947, P. A. 10, toward a footbridge leading to his home, when he saw a light which he judged was coming from a train approaching around a bend a thousand or more feet ahead, so he went to step off the track, but caught the cuff of one overalls trousers leg upon a protruding spike or bolt, which tripped him and caused him to fall so hard that he was knocked unconscious, with a cut place on his head, P. A. 2 and 13, and did not come to himself until hours later in the hospital, after his foot had been cut off, P. A. 4, by the alleged negligent operation of an engine and caboose work train.

Five days after a further amputation the following morning, an assistant claim agent of the railroad company visited him at the hospital while he was still unable to sit up, and told him, we believe falsely and fraudulently, that he was an "investigator", that the railroad had not been negligent, was not liable for the accident, did not wish to settle, but needed information to make a report to the Interstate Commerce Commission, felt sorry for petitioner, discussed the price of an artificial leg, provided him with the name and address of the chief claim agent, advised him to hold on to it, and to be sure to write to him as soon as his leg had healed sufficiently to take measurements, and said that he felt sure the railroad would buy him an artificial leg out of sympathy without any consideration or advantage to it whatever, as petitioner understood. R. A. 37-44.

The purpose of the assistant claim agent's visit apparently was to induce petitioner to write such letter, to create hopelessness in his mind concerning his right to recover, and induce him to abandon all thought of attempting it. The assistant claim agent acknowledged that he did not need the petitioner's statement to make his report to the Interstate Commerce Commission, and his trip to see petitioner indicates that some doubt about liability was in the minds of the assistant claim agent and the chief claim agent who had sent his assistant to see petitioner. In accordance with the assistant claim agent's urging, at the time the assistant claim agent said to do so, R. A. 41, petitioner being unable to write such a letter himself, R. A. 41, 42, had the husband of a niece, R. A. 68, 69, write the chief claim agent accordingly, as follows: R. A. 64.

> "On the 13 of Nov. 1947, a C & O Rail Road Engine hit me at Wharton, W. Va. In this accident I lost my left leg 6 inches below the knee.
>
> "The C & O Investigator advised me to write you,

> And that the C & O Railway Co. would pay for an artificial leg.
>
> "I have been out of the hospital 3 weeks. I was told at the hospital that the leg was healed sufficiently to take measurements for an artificial limb. I am a working man & dont have the money to buy the limb, and would appreciate hearing from you, as to what the C & O Railway Co. will do for me."

The letter said nothing about the railroad being liable, and made no claim whatever. It mentioned five times his loss of a leg and need for an artificial one, and told of his financial inability to get it. It emphasized his poverty and need to get back to his employment and income. Both before and after the assistant claim agent's interview of petitioner, the assistant claim agent had talked with the chief claim agent. Naturally the railroad would be interested in his getting back to work and stopping his loss of income. The chief claim agent replied to the letter petitioner had his friend send, as follows: R. A. 65.

> "Replying to your letter of recent date making claim for injury you sustained at Bim, W. Va. on November 12.
>
> "While we do not think your injury resulted from any negligence whatever on part of the railway company, yet in view of your *request*, am in position to submit you offer of $250 in full and final settlement of claim.
>
> "Please advise if you wish voucher forwarded to you for the above amount, self-addressed enveloped being enclosed for your convenience in letting me hear from you."

Underscore of "request" is counsel's. The petitioner was

too ignorant and inexperienced to perceive any difference in what the assistant claim agent had said to him, and what the chief claim agent wrote. While these were different claim agents, they both represented the same company, and the assistant worked under instruction of the chief. This letter asked if he wished a voucher for the money, and said nothing about a release. Petitioner scribbled in pencil on the bottom of the chief claim agent's letter which he returned.

> "Please send voucher and i will thank you many many times."

The voucher, R. A. 67, was mailed with a letter of "explanation." R. A. 66, which the chief claim agent deemed advisable because, as he testified, P. A. 8, 9:

> "Those vouchers don't altogether resemble a check or piece of negotiable paper, and rather often claimants would sign vouchers, and then send them to me, thinking I would send them something else, instead of taking them to the bank." T., 363-364.

His letter in effect was more of a letter of deception than explanation, because it directed the petitioner's mind altogether to the matter of getting his money, calling it a sight draft, and saying nothing to indicate that it included a release. Petitioner always had in mind the assistant claim agent's statements and assurances at the hospital. When the voucher arrived, petitioner was staying at the home of a relative in a different county, who took care of him gratis while he was still unable to work. When he got back and got the letter inclosing a voucher he read the letter though he didn't understand it, but did not read the mysterious looking voucher, R. A. 67, which the letter explained was just a sight draft, handled the same as any other check as follows: R. A. 66.

"As agreed upon in settlement of your claim for personal injuries received by you at Bim, West Virginia, November 12, 1947, I now enclose our voucher No. 86385, in your favor, amount $250.00.

"This voucher is a sight draft upon the Railway Company and after it has been properly signed and witnessed, should be handled the same as any other check. It should be signed by you on the line marked "SEAL" in the lower right-hand corner and your signature witnessed by two witnesses in the space provided in the lower left-hand corner.

"I am enclosing stamped, self-addressed envelope for your use and will thank you to please advise when and where the voucher is cashed or deposited, and oblige.'

Petitioner never thought of a release being incorporated in the voucher, especially since the chief claim agent's letter called the voucher "a sight draft" "handled the same as any other check", and directed his attention entirely to how to get the money with it. He was desperate for a leg and thought only to get it as quickly as possible, as he understood was intended. He saw no connection between the amount of the voucher, $250.00, and the damages he had sustained through the loss of his natural leg, but remembered the discussion of that amount for the artificial leg at the hospital, R. A. 49, and thought all the time that the artificial leg was furnished because of pity, as the assistant claim agent had said, never suspecting that the railroad wanted a release, because the assistant claim agent had assured him so strongly that the railroad was certain no liability existed upon it, and it had no need or desire to settle or get a release. R. A. 52, 58, 59, 60. This was in point, rather than what the Appeals Court supposed.

To believe that the railroad claim agents had no fear of liability under the facts is inconceivable incredulity. The engineer and fireman both saw the object on the track straight ahead, P. A. 12, from a measured distance of 730 feet, and immediately the engineer slowed down the train from the maxium of twenty miles per hour allowed, to fifteen miles per hour, "maybe less." P. A. 13. In a discovery deposition the engineer estimated that he could have stopped that train under the conditions prevailing there and then in one hundred feet, P. A. 11, said estimate being based upon many years of experience. Interstate Commerce Commission regulations required that the headlight "shall afford sufficient illumination to enable a person in the cab of such locomotive, who possesses the usual visual capacity required of locomotive enginemen, to see a dark object as large as a man of average size, standing erect, at a distance of at least 800 feet." P. A. 17. The engineer testified that the headlight showed up both sides of the track good for half a mile ahead. P. A. 11. He and the fireman testified that petitioner was lying diagonally across the track with his arms raised. P. A. 10. The fireman recognized him to be a man first, P. A. 12, and because he saw the engineer was not attempting to stop, he jumped down from his seat and ran over to him, yelling that it was a man and for him to stop. P. A. 13. The train passed over his foot 39 feet and came to a stop with it under the front wheel of the tender. If the engineer had been as diligent as the fireman, the train would have been stopped before reaching the petitioner. Three recently retired engineers of the New York Central and Baltimore and Ohio railroads testified that he should have been discovered before that. P. A. 13, 15, 16. The money petitioner received in the voucher was tendered back with interest, but the railroad was not willing to rest its case upon the matter of negligence, and refused the tender, which was then deposited with the District Clerk, where it still remains.

Motions of defendant to direct a verdict for it were denied, and the case was submitted to the jury upon special interrogatories, as follows: R. A. 4, 5, 6.

1. "Did the Chesapeake & Ohio Railway Company, by its agents, mislead or attempt to defraud plaintiff in connection with the payment of $250.00 and release of claim?"

The jury answered this, "Yes."

2. "Did plaintiff accept the $250.00 and sign the release with knowledge, express, or implied, that he was thereby settling his claim against the defendant for injuries sustained in the accident?"

The jury answered this, "No."

3. "After the train reached the point where the engineer was able to perceive that the object on the track was probably a person, could he, exercising reasonable care, have stopped the train before it hit the plaintiff?

The jury answered this, "Yes."

4. "If your answer to question No. 1 is "yes", or if your answer to question No. 2 is "no", and if your answer to question No. 3 is "yes", then answer this question. Otherwise, you need not answer: What is the amount of plaintiff's damages?"

The jury answered this, "$10,000.00."

The jury was then polled, R. A. 6, and each juror answered as above. Motions for a directed verdict and judgment for defendant, and in the alternative, to set aside the verdict and grant a new trial, were subsequently argued at length and overruled, and judgment was entered in favor of petitioner upon the verdict.

The Court of Appeals failed to realize the false impressions created in petitioner's untutored and simple mind by the misstatements and misrepresentations at the hospital of defendant's assistant claim agent, and which lingered so indellibly upon petitioner's mind as he complied with said assistant claim agent's urging, and at all times afterwards, especially when he received the offer of the money which he believed was in accordance with the assistant claim agent's assurances, and was intended to buy the artificial leg, to help him get back to work, and given gratis because of the pity, and likewise when the voucher came, with the chief claim agent's letter saying nothing about it containing a release, but assuring him that it was a sight draft, to be handled the same as any other check, which he therefore cashed at once to get his artificial leg as quickly as possible, being desperate to get back to his employment, and as soon as he had his leg so he could get about, commenced to look for a lawyer to handle his claim for injuries received in the accident, never suspecting that he might have relinquished his right in any way, and never imagining any connection between the $250.00 received, as he understood, for the artificial leg, and the damages he had suffered as a result of the accident in which his natural leg was amputated, so greatly in excess of that. The trial court and jury saw the significance of the assistant claim agent's and chief claim agent's action, and to them the evidence of deception, was clear and convincing, because they could appreciate the crafty spider and fly game which the claim agents had played together upon the unsuspecting petitioner.

Under West Virginia law, [illegible] the evidence is such that reasonable men may draw different conclusions from it, the question is clearly for the jury, and its decision, under the Constitutional right of trial by jury, is final even though the

Court would have reached a different conclusion. The Court of Appeals is believed to have erred in failing to give full weight to the lower courts holding that under the circumstances the question of release was one of fact, and not of law.

JURISDICTIONAL STATEMENT

This controversy involves an accident in West Virginia, where a citizen of New York suffered injuries from alleged negligence of a Virginia corporation, for which he recovered a judgment in the District Court for $10,000 and costs. Jurisdiction in the District Court was stipulated (Transcript, page 169), and is believed authorized under Title 28, Section 41, U. S. Code, and in this court, under Title 28, Section 347.

QUESTION PRESENTED

The question here is whether the United States Court of Appeals, Fourth Circuit, under the facts of this case and law of West Virginia, erred in deciding as a question of law the issue as to whether petitioner was deceived in accepting a voucher for $250.00, as being for the loss of his own leg, or a gratuity to buy an artificial leg, as found by the jury and trial court.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

The United States Court of Appeals, Fourth Circuit, has decided an important question of law probably in conflict with applicable local decisions.

PRAYER

Wherefore, your petitioner prays that a writ of certiorari issue under the seal of this Court, directed to the United

States Court of Appeals, Fourth Circuit, commanding said court to certify and send to this Court a full and complete transcript of the record and of the proceedings of said United States Court of Appeals, Fourth Circuit, had in the case on its docket Numbered 6142, and entitled *Chesapeake & Ohio Railway Company, a corporation, Appellant,* vs. *Fred Chaffin, Appellee,* to the end that this cause may be reviewed and determined by this Court as provided for by the statutes of the United States; and that the judgment of said United States Court of Appeals, Fourth Circuit, be reversed by this Court, and for such further relief as to this Court may seem proper.

December 4, 1950.

FRED CHAFFIN,
Petitioner.

By HORACE S. MELDAHL,
Counsel for Petitioner.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM A. D. 1950

No. .....

FRED CHAFFIN,
Petitioner, Appellee Below,

vs.

CHESAPEAKE & OHIO RAILWAY COMPANY,
a Corporation,
Respondent, Appellant Below.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

OPINIONS OF THE COURT BELOW

The opinion of the United States Court of Appeals, Fourth Circuit, appears on page 106 of the record, and is reported in 183 F2d. 948. No opinion was written by the District Court.

JURISDICTION

1. The date of the judgment to be reviewed is November 8, 1950.

2. The statutory provision which is believed to sustain the jurisdiction of this Court is Title 28, Section 347, United States Code. The jurisdiction of the trial court is believed authorized by Title 28, Section 41, United States Code, and was stipulated, (Transcript, page 169).

3. The controversy involves an accident in West Virginia, wherein a citizen of New York suffered injuries resulting from alleged negligence of a Virginia corporation, and judgment was entered by the trial court in favor of petitioner for $10,000.00 and costs.

4. Cases believed to sustain said jurisdiction are as follows: *Richberg* v. *Massachusetts Bonding & Insurance Co.*, D. C. La. 1947, 74 F supp, 442.

STATEMENT OF THE CASE

This has been stated in the preceding petition under I, pp. 2-10, which is hereby adopted and made part hereof.

SPECIFICATION OF ERRORS

1. The United States Court of Appeals, Fourth Circuit, erred in deciding as a question of law the issue of whether or not petitioner was deceived into accepting $250.00 as being for the loss of his leg, instead of a gratuity to buy an artificial leg as he claimed, and the jury and trial court found.

ARGUMENT

The United States Court of Appeals for the Fourth Circuit did not see and hear the witnesses, as did the District Judge and Jury. Apparently it failed to observe material facts and appreciate West Virginia law applicable thereto. The Appeals Court's statement shows it misunderstood the points

and the evidence, if not, as well, the West Virginia law in regard thereto. Its conclusion, contrary to that of the jury and trial judge, that there was nothing upon which a finding of deception or fraud on the part of the respondent could be based, is apparently due to lack of realization of just what transpired. When respondent's assistant claim agent, came to see petitioner at the hospital, he represented himself to be an "investigator", and had come to "interview" petitioner in order "to make a report to the Interstate Commerce Commission". R. A. 36, 37, 38, 39, 41. He acknowledged on the witness stand that he did not need to interview him, or to get a statement from him to make his report, and he had received by telegrams sent by trainmen on the night of the accident all information necessary for that report. Let us see now what was responsible for the jury verdict and the trial court's judgment, which the Appeals Court failed to see. The evidence certainly showed that the chief claim agent had sent the assistant claim agent to petitioner to invite a letter asking respondent to buy him an artificial leg as a gratuity and because of its sympathy. If this were not true the chief claim agent would surely have told petitioner so when he received the letter petitioner had a friend write telling him this, and saying that his assistant claim agent advised him to write to ask for it. The chief claim agent would also have abused the assistant claim agent for assuming such authority, and he would not have proceeded immediately to take advantage of it in exactly the terms the assistant claim agent and petitioner had discussed, the offer he made being the very amount which had been mentioned between petitioner and the assistant claim agent as the cost of an artificial leg, advertised in a Masonic magazine a visitor at the hospital had told him about. R. A. 49.

The assistant claim agent told petitioner at the hospital

while he was still too weak to sit up, that the company knew enough about the circumstances under which the accident occurred to be certain that it was not liable to petitioner, R. A. 38, 39, but it felt sorry for him, and he thought it would be willing to buy an artificial leg out of pity. On this account petitioner believed that the company was not trying to settle, and was offering the money to buy the artificial leg without any consideration whatever, merely as an act of kindness. It was the state of petitioner's mind induced by the assistant claim agents express representations, rather than what an astute and learned judge might have thought, which controls the reaction petitioner felt, and governs the situation involved here under West Virginia law.

It is not our contention that the assistant claim agent fooled petitioner about his right to recover, although it did dim his confidence, but that it fooled him completely about what the respondent was trying to accomplish in regard to a release of his right to recover. The Appeals Court did not see this point at all. It did not realize the crafty spider and fly game the claim agents were playing together upon the gullible, ignorant, unsuspecting, trusting and destitute petitioner, enormously worried about his desperate financial condition at the time, and his chance to earn a living in the future, which caused him, like a dying man grasping for a straw, to accept the invitation to ask for a leg which overpowered him with hope of a solution to his extreme difficulties and otherwise despair. How is it that the Appeals Court could not feel some of the pity which the respondent feigned? It was easy for petitioner to see why the respondent, or anyone else might feel sorry for him.

No one can imagine that there was no connection between the accident petitioner sustained when he was lying unconscious upon respondent's railroad track, and the visit of the

assistant claim agent at the hospital? Obviously, the latter went there to bring about a compromise settlement. But to tell petitioner that would have around hope of a substantial amount, so it wanted to create the opposite impression. The prestenses that it had no wish to settle were obviously false to everyone who heard the trial of this case. The conduct of the claim agent was calculated deception, as plain as could be to the jury and trial judge, and to everyone but the judges of the Appeals Court who failed to understand the evidence properly.

Under West Virginia law, where facts are such that reasonable men may draw different conclusions from them, the proper conclusion is for the jury, and this is true even where the court would have reached a contrary conclusion.

In *Northwestern National Insurance Co.* vs. *Cohen,* 138 Va. 177, 121, S. E. 507, a syllabus states, "Evidence of fraud and imposition in obtaining release must be clear and convincing; but it does not follow that the court can fairly take the question from the jury because the court upon the facts proven, would have reached the conclusion that the release was valid."

In *Flowers* v. *Virginian Ry. Co. Co.,* 116 S. E. 682, 135 Va. 367, it was held, "Evidence that a release was obtained by fraud and imposition must be clear and convincing, but the court cannot take the question from the jury merely because the court upon the facts proven would have reached the conclusion that the release was valid."

In this case "plaintiff claimed he signed the paper thinking it was for the purpose of getting money to buy some clothes, and did not know he was signing a release. It was held for the jury to decide as to fraud and imposition." Our

case is no different in legal principle, as it matters not whether the money was to get clothes, or to get an artificial limb.

Several West Virginia cases hold to the same effect: "Whether a release of liability for injury was obtained by a carrier from a passenger by fraud, held, under the evidence, to be for the jury." *Norvell* v. *Kanawha & Michigan Ry. Co.*, 68 S. E. 288, 67 W. Va. 467, 29 L. R. A. (N. S.) 325.

"Where pedestrian, being a deaf mute, is injured, and while in the hospital a short time thereafter is approached by a claim agent of the railroad company, and he then executes a release or acquittance for personal injuries, in consideration of payment of hospital services, without being able to read the release, and relies upon the representation of the claim agent that the paper signed is for the purpose only of making provision for payment of hospital charges, in order that he may remain in the hospital, it is error for the court to hold that such release will sustain a plea of accord and satisfaction; whether such release so obtained will sustain such plea is likewise a question for jury determination". *Wendell* v. *Payne*, 89 W. Va. 356, 109 S. E. 734.

"In a suit to restrain the sureties on an executor's bond from setting up as a defense in an action on the bond a release of one of them evidence *held* to show that the release was obtained by the surety by fraud and undue influence upon the only heir of the estate." *Riggs* v. *Gillespie*, 241 F. 311, and ceritorari denied, 244 U. S. 658.

"In a personal injury suit, court erred in refusing instruction that release alleged by defendant was invalid, if obtained by fraud or imposition on plaintiff, that jury should consider all circumstances surrounding parties, such as their

experience and intelligence or lack threof, their physical and mental condition, truth or falsity of statements made to induce execution of release, and adequacy of amount paid therefor, in determining whether fraud or imposition was used, and that plaintiff was not bound by release, if defendant, by its insurer's agent or anyone else, imposed their wills on plaintiff so that his mind was overpowered and he became so confused and worried as to be deprived of proper judgment." Also "Adequacy of consideration for release is a material question." *Bedser* v. *Hornton Motor Lines*, 122 F. 2d 406.

In *Ferries Co.* v. *Brown*, 121 Va. 13, 92 S. E. 813, "The court instructed the jury that unless they believe from the evidence that the relase was executed by the plaintiff without misrepresentation or fraud by the defendant's agent, and was for valuable consideration, the release in nowise bars the plaintiff, it was objected that this instruction placed upon defendant the burden of proof of showing that the release was without misrepresentation or fraud on the part of the defendant Held: that the objection was not well taken. The instruction did not undertake to deal with the question of the burden of proof. The defendant was not prejudiced by it, especially in view of the fact that an instruction almost in the same form was given at his own request."

"Whether a particular transaction amounts to a release of a lien is a question of intention on the part of the releasor." *Taylor* v. *Godfrey*, 59 S. E. 631, 62 W. Va. 677.

"Citing *Carroll* v. *Fetty*, the Supreme Court of West Virginia held in *Bank* v. *Hansbarger*, 129 W. Va. 418, "It is a general principle that a transaction may be avoided on account of duress and wrongful pressure."

"The trick tried in the present case is not new for respondent, as shown by *C. & O. Ry. Co.* v. *Howard,* 178 U. S. 153, "An action for personal injuries in which it appeared that shortly after the accident defendant's surgeon paid plaintiff $200, representing it to be a gratuity given by defendant in recognition of plaintiff's misfortune and poverty, and plaintiff signed a paper which surgeon told her was a receipt for the money, but which was in fact a release of plaintiff's claim against defendant because of injuries, the Court in indicating that plaintiff's failure to tender money received by her did not preclude her maintenance of present action, said, " 'If offered and received as a gratuity, the instrument, though in form a release, is nothing more than a receipt for the money.' "

On the matter of respondent's liability aside from the release, the following recent cases are in point.

West Virginia commonly has the utmost respect for decisions of the Supreme Court of Virginia, and the latter court in the recently decided case of *Washington & O. D. R. R.* v. *Taylor,* 50 S. E. 2d 415, 188 Va. 458, said, "Engineer need not have actually known that object on track was human being, and if in the exercise of ordinary care he could have discovered that object on track was a human being in time to have avoided running over him, (but did not) railroad is liable." Parenthesis is counsel's. The Court further said, "Where trainmen see, or should see, in exercise of ordinary care, a trespasser in peril, it is their duty to avoid injuring him if it can be done consistently with safety to themselves and to passengers." Also, "In action against railroad for death of accident victim who was lying upon track in an intoxicated condition when run over by a freight train, evidence that tracks in vicinity of place of accident were in common use as a passageway, that visibility was good, that engineer had an

unobstructed view of the track for a distance of 1200 feet, that no whistle was sounded or bell rung to warn victim, and that children sought to flag train down before it reached point of accident, sustained recovery." Also, "*Instruction that railroad employees, after discovering an unknown object on tracks, even in case of a trespasser, although the employees believed the object to be inanimate, have duty to keep lookout until its character is determined, and, as soon as employees discover, or by exercise of reasonable care could have discovered such object to be a person, employees have duty to use reasonable care to avoid injuring or killing him.*" Also, "Instruction that if railroad employees saw, or in exercise of reasonable care could have seen, within sufficient time to have avoided accident with safety to themselves, that victim was in perilous position from which he was unable to extricate himself, recovery was authorized even if victim was negligent in putting himself in a place of peril, was proper."

Recent West Virginia cases indicating the same law applies here are: *Stokey* vs. *Norfolk & Western Ry. Co.*, 55 S. E. 2d 102; *Hall* v. *Monongahela West Penn Public Service Co.*, 128 W. Va. 547, 37 S. E. 2d, 471 and *C. & O. Ry. Co.* vs. *Craft*, 162 F 2d. 67.

The rule that questions of negligence are likewise for the jury where reasonable minds may differ, has been held in *Ewing* v. *Lanork Fuel Co.*, 65 W. Va. 726, 29 L. R. A. (N. S.) 487, *Taylor* v. *Huntington*, 126 W. Va. 832, 30 S. E. 2d 14, *Reall* v. *Deirriggi*, 34 S. E. 2d 253, 127 W. Va. 662, *Gilkerson* v. *B. & O. Ry. Co.*, 129 W. Va. 649, 41 S. E. 2d 188, *Davis* v. *Pugh*, 57 S. E. 2d 9, *Isgan* v. *Jenkins*, 59 S. E. 2d 689, *Isabella* v. *West Virginia Transportation Co.*, 51 S. E. 2d 318, *Wright* v. *Valon*, 130 W. Va. 466, 43 S. E.2d 364, *Walters* v. *Appalachian Power Co.*, 75 W. Va, 676, 84 S. E. 617, *Raines* v. *C. & O. Ry. Co.*, 19 S. E. 565, 39 W. Va. 50,

24 L. R. A. 226, *Klinker* v. *Wheeling Steel & Iron Co.*, 27 S. E. 237, 43 W. Va. 219, *Damron* v. *Ohio Valley Electric Co.*, 117 W. Va. 725, 188 S. E. 126.

To see how the Appeals Court misunderstood the facts of this case and the West Virginia law applicable thereto, let us examine the opinion.

1. The Appeals Court opinion states that the petitioner was able to read and write.

The facts show that he could barely scribble, and was incapable of writing the letter to the Chief Claim Agent, which the Assistant Claim Agent urged him to write, and had to get it written by the husband of a niece. He had gone to a six months country school for only two terms, and was in the second reader when he quit school. He testified that he could not understand many words when he attempted to read.

2. The Appeals Court opinion states that he had spent the afternoon at a pool hall and beer garden.

In fact, he had spent the afternoon around the town, going several times to the home of Earl Lucas, for whom he was waiting, and seeing him there promptly when he returned from the mine, and starting home almost immediately afterwards. Lucas testified that he was not drunk then, and numerous other witnesses were ready to testify to the same effect regarding him afterwards, but the Court held this was immaterial.

3. The Appeals Court opinion states that he had drunk three or four bottles of beer during the afternoon.

The only beer he had drunk was at a duly licensed establishment, where only legal non-intoxicating beer was sold. It is

preposterous to bring up this issue when evidence was not taken upon it because the trial court held it immaterial. It had nothing whatever to do with the liability of respondent, inasmuch as the last clear chance doctrine was the basis of petitioner's action, and petitioner was completely unconscious after his fall. He was fully conscious up to that time.

4. The Appeals Court says the enginemen saw an object on the track 500 or 600 feet away.

The measured distance was 730 feet. The enginemen testified that they saw the object, which they thought might require a stop, as soon as they came around the bend and got straightened up on the straightaway, and that by actual measurement was 730 feet from where petitioner had fallen, and was lying unconscious.

5. The Appeals Court says they slowed down to fifteen miles per hour, but the engineer testified "maybe less."

6. The Appeals Court said that it was not until they were two or three cars (40 foot car lengths) away that they concluded that the object upon the track might be a human being.

This was what the engineer said in regard to when he discovered petitioner, which was after the fireman had jumped down from his seat and came excitedly over to him calling for him to stop because he had discovered that it was a person, and knew the engineer was not acting as he should be to avoid injuring the man. In fact, if the engineer had been as diligent as the fireman the injury would not have been inflicted. But before that they should have been proceeding with such precaution that they would have been able to stop before injuring him, after their curiosity had been aroused.

and they were uncertain about what the object on the track might be, until they knew it was not a person. *Washington & O. D. R. R.* v. *Taylor*, 50 S. E. 2d 415. The three retired engineers of the B. & O. Ry. Co. and N. Y. C. Ry. Co. proved the engineer negligent by their testimony.

7. The Appeals Court mentioned the tests as having been made at 17 miles per hour.

These tests were made without any representative of petitioner having been allowed to be present. They were made by *accelerating* speed as rapidly as possible until the Chief Claim Agent hollowed "Now", and threw down his wrench, and under such circumstances the indicator on the speedometer would lag greatly behind the actual speed, as on an automobile, and the reaction time of the engineer could easily be exceptionally slow. It is very contrary to the original opinion of the engineer based upon his many years of experience, and the testimony of the three retired engineers of other roads. In all probability the speed of the locomotive was in excess of twenty miles per hour when the speedometer read seventeen.

"Railroad employees, after discovering an unknown object on tracks, even in case of a trespasser, although the employees believed the object to be inanimate, have duty to keep lookout until its character is determined, and, as soon as employees discover, or by exercise of reasonable care could have discovered, such object to be a person, employees have duty to use reasonable care to avoid injuring or killing him." *Washington & O. D. R. R.* v. *Taylor*, 50 S. E. 2d 415, 188 Va. 458.

8. The Appeals Court says there was nothing deceptive in assistant claim agent's visit.

His representation that he was an investigator was phoney. He claimed that he was investigating to make a report to the Interstate Commerce Commission. He admitted that this was false. He had all the information by telegram on the night of the accident needed to make that report. He stated that he had already such information that the company knew it was not liable, and had no wish to compromise, or make a settlement. However, he assured petitioner that if he would write the chief claim agent a letter as soon as his leg was sufficiently healed to take measurements, he was confident the chief claim agent would buy him an artificial leg because they felt sorry for him, and he was careful to write out the name and address of the Chief Claim Agent and leave it with him, telling him to be sure to hold on to it and to write. He knew that in the mental and physical state petitioner was in at that time, a release would be invalid. This was in a very out of the way place, and difficult for him to keep in touch there. His representations certainly created uncertainty in petitioner's mind about his right to recover against the railroad, but it convinced him completely that the railroad had no desire to settle, but wanted to be very magnanimous, and would therefore, out of pity, buy him an artificial leg so he could get back to work. If that is not actual and deliberate misrepresentation and deception, then, there isn't such a thing in any case. The assistant claim agent's visit was a deliberate plan to put out the bait to catch the poor, ignorant, gullible, trusting petitioner, and it worked just exactly like the claim agents planned and intended. The statement that they had no wish to settle, and made no offer to settle, was deliberate to keep the petitioner from getting any hope in mind of some amount commensurate with his loss. To say that they were certain there was no liability upon the railroad, when the enginemen had seen the object on the track, 730 feet ahead, under the spotlight glare of a headlight meeting Interstate Commerce

Commission requirements, sufficient to recognize a person in dark clothing erect 800 feet ahead, lying diagonally across the track between the rails with his arms up, was obviously too naive for anyone at the trial to imagine.

9. The Appeals Court evidently assumed that petitioner received the letter of December 24 promptly, but in fact he was out of the county at that time, and he did not get it until he returned, not earlier than January 14, 1948, which date may have been the 15th instead, as the voucher was witnessed the night before it was cashed.

10. The Appeals Court says its "account of the transactions between the parties leading to the acceptance and signing of the voucher by the plaintiff is not disputed."

In fact, that account is greatly disputed, and emphatically denied, in all the particulars hereinbefore mentioned, and in further respects following.

11. The Appeals Court did not see the distinction between the instruction the trial judge gave the jury in the one regard, and in the other regard wherein he sustained the jury's finding, because he realized that reasonable men might believe that petitioner could tell by a glance at the voucher that he wouldn't be capable of understanding it, and did not attempt to do so in view of the letter of "explanation" which said it was only a sight draft, and handled the same as any other check, and did not say anything about its being a release, and particularly because the assistant claim agent had assured him so emphatically that the railroad had no desire for a release because it knew it was free from liability and would send him the $250 to buy the artificial leg just because it felt sorry for him, which is why the petitioner was so grateful that he thanked them "many many times". Petitioner sup-

posed that a release would be a different paper than a voucher to be cashed at the bank. The letter directed his attention only to how to get his money so he could proceed to get his artificial leg, which he promptly undertook to get with the money, so he could get back to work. He thought if he went to Louisville after it, he could bring his artificial leg back with him, supposing it could be fitted like a new pair of shoes.

12. The Appeals Court's statement that there was nothing upon which a finding of fraud could be based showed how little it understood the record in the case, and the facts set forth in the appendices to the briefs of petitioner and respondent.

13. The Appeals Court's statement that the correspondence was completely devoid of misstatement and deceit, is quite obviously thinking of it apart from everything which had happened aside from it, and ignoring the reiteration in it that the company was free from fault, the letter asking if he wished a voucher sent for the $250, which said nothing about a release, and the fact that the last letter called the voucher only a sight draft, making no reference to its containing any release, and that it was to be handled the same as any other check, and there being no separate paper or form of release, such as petitioner thought would be involved if desired. The court should have considered everything that happened as a whole, in determining what went on in the untutored and inexperienced mind of petitioner, rather than what a most learned judge and lawyer would have expected or considered.

14. "Nothing took place on November 17 to confuse or mystify the plaintiff."

How the foregoing statement could be made by the Appeals Court is most mystifying itself, except to show how little the

Court was aware of the influence of the assistant claim adjuster's misstatements upon the mind of petitioner. He convinced the petitioner that he did not want to settle or compromise, that he had no fear of liability, that he did not desire a release, that they felt sorry for petitioner, and were very generous, and would buy him an artificial leg out of pity and generosity, and did not disclose to him that the Vocational Rehabilitation Service would furnish him the artificial leg free, as it did later, when he couldn't wear the first leg because of the blisters it wore, the sole purpose being to cause him to think a suit would be hopeless, and to get him into a trap. They knew that at that time his condition was such that any compromise then could be avoided, and he was in such an out-of-the-way place that it would not be convenient to get back, and they chose the time for the new approach, being when his leg was sufficiently healed to take measurements, to which time he waited before having the letter written, as the assistant claim agent instructed him to do.

15. "Acquainted with operation of railroad trains and maintenance of right-of-way."

He knew nothing about the operation of a train, other than that they ran along railroad tracks. All he knew was how to put the tracks back in shape when spikes, which held the rails to the ties became loose, and to adjust ballast. This did not have anything to do with the accident, nor to the question of liability or release. He worked for a mining company.

16. "Foreman of the crew."

He was not in charge of the crew at all. He sometimes made suggestions to other workers in his group, but he had no authority over them whatever.

17. "Statement of agent to petitioner at hospital was no more than expression of his own opinion."

Unquestionably the agent was speaking for the railroad, and it could not be interpreted by anyone as independent of that. It was stated by him to be the attitude of the company, even in the agent's remarks, and it was understood by petitioner to be the attitude of the company.

18. "Not without foundation in view of the facts of the case."

This is likewise utterly preposterous, in view of the fact that petitioner was lying unconscious diagonally across the track between the rails with his arms up, while the train traveled 730 feet at a speed of 15 miles per hour, "maybe less", with only an engine, tender and caboose, and he was in the spotlight of a headlight which showed up the track good for half a mile ahead, according to the testimony of the engineer and fireman, and which met Interstate Commerce Commission requirements, which required that it enable the enginemen to recognize an object such as a man in dark clothing erect 800 feet ahead. The fireman recognized petitioner first, and if the engineer had been equally diligent the train would have been stopped 39 feet quicker, and not have reached petitioner. Three other engineers said it should have been stopped further away than that, and the jury saw a demonstration of the headlight, which the Appeals Court didn't see. The trial court and jury were certainly better able to judge this than the Appeals Court.

19. It didn't serve to deceive or coerce plaintiff because he didn't agree that railroad was not liable.

It did serve to deceive and coerce plaintiff, because it convinced him that they were offering to give him the money to buy the leg without any desire for a release, and inde-

pendent of any possible liability, because of pity and generousness, while they were certain that they were without liability, and had no need to worry about that. So far as he was concerned, he didn't know about liability, but he felt that he had nothing to lose in accepting the money, which he was made to believe was offered without any strings whatever attached. Where did all the generosity come in on any other basis?

20. "Suggestion that railway company might be willing to buy an artificial leg was not coercive."

It was very coercive, because the assistant claim agent *urged* him to write, and assured him that there would not be any doubt actually, that the railroad would buy the leg out of pity and generosity, and told him to be sure not to lose the chief claim agent's address, and to be sure to write, and that the money would be given out of generosity, without any consideration whatever, and that there was no desire for a release, as the company knew no liability existed.

21. "Letter of chief claim agent included no attempt to bring pressure."

It reiterated the "no liability" contention of the assistant claim agent, and enclosed a self addressed stamped envelope for "convenience" in replying hastily. It was certainly connected up closely with the assistant claim agent's misrepresentations, and statements in the letter Joe Evans wrote because of the inability of petitioner to write that letter.

22. "Three weeks before he wrote (had written) that letter the assistant claim agent urged him to write, and assured him would result in his getting the money to buy the leg without any consideration therefor, but because of pity and generosity, etc.

This was the time it took for his leg to heal sufficiently to take measurements, as the assistant claim agent told him to wait to that time before writing. He was simply following the assistant claim agent's instructions. This delay was due to the realization that he was not at that time in condition mentally and physically, to execute a valid settlement. The assistant claim agent was pretending it didn't wish to make a settlement, and that he had no authority to make a settlement, because it was certain no liability existed. The jury could see well enough that this was a false pretense on the part of the assistant claim agent, merely to keep him from thinking about big money. They knew he would demand more if they talked about a settlement for the loss of his leg.

23. The Appeals Court incorrectly assumed that petitioner held the check three weeks before using it.

This was not true because he was away, in another county, among friends or relatives who were taking care of him while he was unable to take care of himself, and he did not get the check until he got back, the evening before he cashed it.

24. No attempt to see him during the meantime.

This was pure conjecture on the part of the Appeals Court. He was away, in another county, during all this time. There is no evidence in the record as to whether the railroad adjusters tried to see him or not. It is obvious that they couldn't have found him during this time.

25. "Nothing to indicate mental impairment."

If his distress, weakened condition, and mistaken idea of what the claim agent and assistant claim agent were up to did not constitute mental impairment, nothing could. He

was simply bewildered by the whole chain of circumstances, as the jury could well perceive from looking at him, and hearing his story and that of the other witnesses.

26. The evidence had to be "clear and convincing."

It was certainly clear and convincing to the jury and trial judge. That it wasn't clear to the Appeals Court was due solely to its failure to grasp the situation and to understand the facts properly.

27. "Evidence of fraud or misrepresentation or mistake is nonexistent."

This is a statement about as far from the facts as it is possible to conceive, and altogether opposite the conclusions of the jury and trial judge. This is a conclusion of fact, not law, and altogether contrary to the evidence, which latter shows most plainly that petitioner was deceived and misled and tricked into writing for the money to get an artificial leg, without discovering the switch, and without realizing the difference, and after assurances of the most strong and specific kind that no settlement or release was desired, because they were certain there was no liability, but then tried to get a release, concealed in a voucher, represented to be "a sight-draft," "the same as any other check," without mention of a release, and with his attention directed only to the way to get his money, and when so many other people were unable to understand the voucher, and were fooled by it too, and which petitioner cashed in his desperation and haste to get the artificial leg for which he thought the money was intended exlusively, and for which he used it promptly as soon as he got it. The fact that he began trying to get a lawyer immediately afterwards shows that he never dreamed that he had relinquished his right. He relied all the way through upon what the assistant claim agent had impressed so indelibly

upon his mind in regard to the matter. How the Appeals Court would fail to perceive these facts is inconceivable. Its statement is practically equivalent to judging the trial judge and jury, who saw the witnesses and heard all the evidence, as being void of reason.

The Appeals Court action further assumes that no better case for the plaintiff could be made upon a retrial, which is likewise incorrect, as a much stronger case could be made for the plaintiff upon a retrial, where he could have the testimony of Dorsey Workman, who was sick before, and other witnesses in the ward while the assistant claim agent was there, and additional witnesses upon practically every other point in the case.

28. The petitioner "relies upon the cases of *Irish* v. *Central Vermont Railway* and *Flowers* v. *Virginian Railway Co.*"

These were two of the cases cited in petitioner's brief, wherein people had been induced wrongfully to execute releases, wherein the fraud rather than the bait was the material point, but petitioner did not rely as much upon them, as upon the general knowledgle of the court. Petitioner had only from September 12, 1950, to September 27, 1950, to prepare, have printed, and file his brief and appendix, and in view of other matters requiring his attention in the meantime, this was greatly inadequate. It was never imagined, however, that the Appeals Court would fail to discover the facts upon which the verdict and judgment of the trial court were based, or to confirm them. The transaction was one resting upon *everything which had happened*, and which petitioner had carried so continuously in his mind from the visit of the assistant claim agent to the cashing of the voucher which he thought was only gratuitous for the artificial leg, and not the correspondence alone, as the U. S. Court of Appeals, Fourth Circuit, evidently concluded.

SUMMARY OF ARGUMENT

POINT A. The United States Court of Appeals, Fourth Circuit, erred in deciding as a question of law the issue as to whether petitioner was deceived in accepting the sum of $250.00, as being for the loss of his natural leg, or as a gratuity for the purchase of an artificial leg, so he could get back to work and overcome his loss of income.

ARGUMENT IN SUPPORT OF POINT A

The visit of the assistant claim agent, who invited and urged petitioner to write for the money to buy an artificial leg as soon as measurements could be taken, the assurance that it would be paid for as a gratuity, and that the railroad was not interested in trying to settle, because it was sure no liability existed against it, and it had no need for a release, but he was there merely to get information to make a report to the Interstate Commerce Commission, and calling himself an "investigator," definitely fooled the petitioner from the very beginning, and was nothing but a trap calculated to deceive and defraud him. Petitioner was too ignorant and inexperienced to perceive the trick, and was led to trust them by their professions of sympathy and generosity. He used the mysterious voucher upon the Chief Claim Agent's representations that it was merely a sight-draft, handled the same as any other check, and which explained only how to get the money on it, petitioner supposing that no release was involved, because there was no other paper, and being unfamiliar with such a thing as a release incorporated in a sight-draft or check, and which voucher was so complicated that the Chief Claim Agent had adopted an invariable practice of sending letters of "explanation" because so many people did not understand it, and "returned it to him thinking he would send

them something else," rather than using it to get their money, including such highly educated persons as Dr. Stoddard. The U. S. Court of Appeals, Fourth Circuit, erred in ordering the judgment entered by the District Court set aside.

It is therefore respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, by granting a writ of certiorari and thereafter reviewing and reversing said decision.

HORACE S. MELDAHL,
Counsel for Petitioner.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

No. 463

FRED CHAFFIN, *Petitioner,*

V.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY, a Corporation, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF RESPONDENT

Diversity of citizenship is the sole basis for federal jurisdiction in this action. There is no question but that the substantive rights of the parties are governed by local law. In asking this Court to review the decision of the Court of Appeals for the Fourth Circuit, petitioner contends that there has been decided an important question of local law in a way probably in conflict with applicable local decisions.

From the opinion below, which is reported in 184 Fed. 2d 948, it is seen that the Court of Appeals did not find it necessary to pass on any of the questions raised other than that of settlement and release, because " * * * the evidence clearly shows that the plaintiff executed a valid release whereby the Railway Company was discharged from all liability for damages in-

curred in the accident." It is very true, of course, that the question passed upon is of importance to the parties themselves in the sense and to the extent that all actions are important to those directly concerned. Outside of that limited significance of the word "important," we do not hesitate to say that the question involved in this case is clearly run-of-the-mine, if not of lesser gravity and importance.

Additional to lack of importance, we think it is readily seen that the question passed upon is not of such character as to warrant review upon writ of certiorari in that it involves the review and application of evidence rather than construction or interpretation of local law. Under the rules and practice of this Court, writs of certiorari have not been deemed justified merely for the purpose of reviewing the evidence or inferences which might be drawn from it. *General Pictures Co. v. Electric Co.*, 304 U. S. 175, 82 L. Ed. 1290, 58 S. Ct. 860, *Southern Power Co. v. N. C. Public Service Co.*, 263 U. S. 508, 68 L. Ed. 413, 44 S. Ct. 164.

Petitioner actually complains of what the Court of Appeals has found, after careful examination of the record, to be the evidence and the reasonable inferences that might be drawn therefrom. His own brief and petition make it apparent in this proceeding that little more than lip service is being paid to the established reason which has been advanced for allowance of the writ. The local law involved is so clear and simple as to foreclose any reasonable complaint of the decision being " * * * probably in conflict with applicable local decisions."

The only legal principle involved, other than some of an everyday elementary nature which are beyond

dispute, has to do with the quality and perhaps the quantity of evidence required for an issue to the jury in cases such as this, where the validity of a release is attacked by the releasor. Under the law of West Virginia the evidence of fraud or other wrongdoing on behalf of the person released must be "strong and convincing" to warrant submission of an issue to the jury. Unless and until evidence of such quality is produced, the case does not move beyond the zone of preemptory instruction.

As to the law bearing upon the question determined by the Court of Appeals, petitioner makes reference in his brief to decisions from other jurisdictions and the West Virginia cases of *Norvell v. Kanawha & Michigan Railway Co.*, 67 W. Va. 467, 68 S. E. 288, and *Wendell v. Payne, Agent, etc.*, 89 W. Va. 356, 109 S. E. 734. The West Virginia cases cited are wholly without significance, and those from other jurisdictions, if at all in point, are obviously not controlling. He ignores the controlling cases such as *Carroll v. Fetty*, 121 W. Va. 215, 2 S. E. (2d) 521; *McCary v. Traction Co.*, 97 W. Va. 306, 125 S. E. 92; *Danchatz v. Coal & Coke Co.*, 110 W. Va. 212, 157 S. E. 404; and *Janney v. Railway Co.*, 119 W. Va. 249, 193 S. E. 187.

Our court of last resort has pointed out that the foregoing characterization of the quality of evidence required for a jury issue is definitely more than a "preponderance of the evidence." As stated in *Zogg v. Hedges*, 126 W. Va. 523, 29 S. E. (2d) 871, "If we have not said that such evidence must be greater in quantity, there can be no doubt that we have repeatedly held that it must be higher in quality — in clearness, full-

ness, and persuasiveness." See also *Tokas v. Arnold Co.*, 122 W. Va. 613, 11 S. E. (2d) 759.

From petitioner's standpoint, the Court of Appeals has made as fair and complete a statement of the material facts as the record admits. In doing that, the Court was obviously not unmindful of the fact that petitioner had received a verdict in the trial court. Having analyzed these facts, the Court was forced to conclude that evidence of wrongdoing on the part of respondent in connection with the settlement and release was simply "non-existent." As we have already indicated, this analysis of the evidence and its inferences lies alone at the base of petitioner's request for a writ of certiorari. Aside from the fact that it does not, under the rules and practice of this Court, constitute sufficient reason for allowance of a writ, the fault which petitioner would find with the Court of Appeals is completely without merit. He has, in both his petition and brief, drawn innumerable inferences and conclusions from what can be no more than half truths and misleading statements of fact. Purported statements of fact are largely without reference to the record, and where even so much as inferred to be different from the material facts as stated by the Court of Appeals, are most certainly without foundation.

We respectfully submit that the petition filed herein for a writ of certiorari should be denied.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1950

No. 463

FRED CHAFFIN, Petitioner,

vs.

THE CHESAPEAKE & OHIO RAILWAY COMPANY,
a Corporation, Respondent.

REPLY BRIEF OF PETITIONER

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IN THE

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REPLY BRIEF OF PETITIONER

But for the failure of the United States Court of Appeals for the Fourth Circuit to observe the evidence of fraud upon which the verdict of the jury and judgment of the trial Court was based, we would not deem it desirable to reply at all to respondent's brief. It is probable that this was overlooked by the Court of Appeals because most of it appeared in the Appendix to the Appellant's Brief rather than in Appellee's, it being thought unnecessary in the latter in view of its inclusion in the former. We agree with respondent that the Court does not pass upon factual matters, which is precisely what we contend the Court of Appeals wrongly did, and contrary to the evidence, thus its action was erroneous.

Omitting unessential parts, the testimony of petitioner, commencing on page 36 of the printed record; being likewise page 36 of appellant's (respondent's) appendix to the original brief in the Court of Appeals, is as follows:

Q. Mr. Chaffin, how far did you go in school?
A. Second grade.
Q. What kind of a school did you attend?
A. Just a country school.
Q. Do you have to wear glasses to be able to see, Mr. Chaffin?
A. To read, I do.
Q. Are you able to read with glasses?
A. Some. I am not very good at reading.

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Q. Now, Mr. Chaffin, do you recall Mr. P. C. Carpenter coming to see you when you were in the Madison General Hospital?
A. Yes, sir.
Q. What was your condition on that day?
A. Well, I was a-laying in the bed and I weren't resting so very well.
Q. Did he, when he first came there, tell you he wanted to talk to you?
A. He told me who he was and his business there.
Q. What did he say was his business there?
A. To get a report on the accident, my accident.
Q. For what purpose?
A. For the Interstate Commerce.
Q. For the Interstate Commerce Commission?

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A. Yes, sir.

Q. I am talking about the time, any time he was there, did he, before or after you told him about it, did he say anything about whether the railroad was liable?

A. He said the railroad weren't liable; he said I was violating the law, and was a trespasser. and the railroad weren't responsible for anything.

Q. Did he tell you that he wanted to settle your claim, or anything of that kind?

A. No, sir.

Q. Did he tell you that he didn't want to?

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A. He said they didn't owe me anything.

Q. Did he write out the name of "Mr. H. B. Persinger, Claim Agent, care C. & O. Railway Company, Huntington, West Virginia" on a piece of paper while he was there?

A. Yes, sir.

Q. And did he give you that piece of paper?

A. He laid it on the desk.

Q. Did he hand it to you?

A. He just wrote it, and told me what he had wrote on there, and laid it on the desk, where some more stuff was a-laying.

Q. Did he tell you anything about what to do with it?

A. Yes.

Q. What did he tell you to do with it?

A. He said if I would write Mr. Persinger, he was sure Mr. Persinger would help to buy my artificial leg.

Q. Did you discuss with Mr. Carpenter about the cost of an artificial leg?

A. I believe we discussed it, it would cost around $200 or $250 to buy one.

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Q. You had a conversation with him in regard to it costing about $200 or $250, is that right?

A. Yes, sir.

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Q. What did Mr. Carpenter tell you in regard to writing to Mr. Persinger, as to when you should do so?

A. He said when my leg got sufficient that you could take measurements.

Q. To write him at that time?

A. Yes, sir.

Q. And did you wait until you were advised by the hospital that your leg was sufficiently healed to take measurements?

A. Yes, sir.

Q. Now, did you write the letter yourself?

A. Mr. Joe Evans wrote the letter for me.

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Q. Did you tell Mr. Evans what you wanted to write?

A. I told Mr. Evans to write just exactly what the investigator told me in the hospital.

Q. Did you read the letter after Mr. Evans wrote it for you?

A. No, sir.

Q. Well, Fred, did you think that $250.00 was a settlementment for the loss of your leg?

A. I hadn't asked for any claims or damages.

Q. The Court: You are not answering the question. The question was, did you think that $250.00 was a settlement for the loss of your leg?

A. No, sir.

Q. Did you think that $250.00 was to get your artificial leg?

A. Yes, sir.

Q. What did you use the draft for?

A. To buy an artificial leg with.

Q. Do I understand that you told Mr. Carpenter there at that time time that you had seen, been an advertisement in a Louisville paper that you could buy an artificial leg for $250.00?

A. It was, Mr. Joe Evans belongs to the Masonic, and he gets a paper, and he had told me about it in the hospital; it was in a Masonic paper.

Q. And did you tell that, I mean, to Mr. Carpenter?

A. Yes, sir.

Q. You did?

A. Yes, sir.

TESTIMONY OF JOE EVANS

Q. You put in it (the letter to H. B. Persinger, chief C. & O. Claim Agent) approximately what he (petitioner) told you, I take it?

A. Yes, sir.

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The letter explains, "The C. & O. Investigator advised me to write you, And that the C. & O. Railway Co. would pay for an artificial leg.

I have been out of the hospital 3 weeks. I was told at the hospital that the leg was healed sufficiently to take measurements for an artificial limb."

P. C. CARPENTER, Assistant Claim Agent

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Now, Mr. Carpenter, isn't it true that when you went there that you told Mr. Chaffin that you weren't there to try to make a settlement of this case?

A. That is true.

Q. How is that?

A. That is true.

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Q. And didn't you tell him that you didn't want to make a settlement with him?

A. I had no authority to make a settlement.

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H. B. PERSINGER

Q. You are familiar with the accident involved in this case, are you?

A. Yes.

Q. It was investigated out of your office?

A. It was.

Q. Did you, yourself, personally take part in any of that investigation?

A. To some extent I did; I had personally talked with the engine crew before an investigation was made on the ground.

Q. And was that before November 18, 1947? (The date the assistant claim agent Carpenter interviewed petitioner in his bed at the hospital)

A. It was."

The letter, of which portions are quoted above, shows that petitioner had it written only because the assistant claim agent "advised" him to do so, because it so states, and it further shows that he was trying to comply as to the time it was written and in all other respects with what the assistant claim agent had recommended so strongly, and in reliance thereon, and that petitioner was keeping in mind all the way through what the assistant claim agent had told him to do, and what would be the result.

The jury was entitled to believe the petitioner, and to judge what the assistant claim agent and chief claim agent were really up to in going to call on the petitioner while he was in the hospital. This evidence is only a part of what the jury had to consider, but it is believed sufficient to show that the jury and trial judge were right in rendering their verdict and judgment in favor of the petitioner, and that the United States Court of Appeals for the Fourth Circuit was wrong in setting it aside, for under West Virginia law, including its constitution, the question was one of fact for the jury, and could not properly be taken from it by the Court, as the District Judge properly held. Therefore, the action of the United States Court of Appeals for the Fourth Circuit should be reviewed and corrected.

Respectfully submitted,

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Counsel for Petitioner.